A **CBTECH (M) SDN BHD**

v.

ALPHA FLOWTECH SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3-12B-1094-2010]
29 AUGUST 2011

C ***CONTRACT:*** *Building contract - Payment - Claim for payment for work done under sub-contract - Entitlement to balance sum owed for work done - Gas installation works - Whether there was delay - Whether issuance of Certificate of Completion and Approval to Operate conclusive evidence*

D ***CONTRACT:*** *Construction of terms in contract - Ambiguity in contract - Interpretation of completion date - Whether court could refer to relevant statutory provision to determine time of completion - Findings of fact by trial judge - Whether justified*

E ***EVIDENCE:*** *Burden of proof - Allegation of particular fact - Facts within knowledge of appellant - Back to back payments - Whether payment received from main contractor - Evidence Act 1950, s. 106*

This appeal arose out of a construction contract where the
F respondent, a sub-contractor, sued the appellant for RM116,950 being the balance payment due and owing for works done and completed. The respondent and the appellant entered into a sub-contract ('P1') where the respondent was to design, construct and complete gas installation works for 632 units of government
G apartments. Among the conditions in P1 was that the overall completion date of the main contract was on 23 December 2005. The respondent's pleaded case was that they had completed the works and relied on the Certificate of Completion issued on 12 July 2007 and 25 progressive claims. The appellant contended
H that the works were not completed within the time stipulated and counterclaimed for having to employ a third party sub-contractor to complete the works. The manner in which the works were to be completed was not stipulated in the contract, therefore the trial judge referred to the Gas Supply Regulations 1997 ('GSR') and
I Gas Supply Act 1993 ('GSA') and decided in favour of the respondent and dismissed the appellant's counterclaim. Hence this appeal. The issues that arose were, *inter alia*: (i) whether the

issuance of an Approval to Operate ('ATO') by the Energy Commission was conclusive evidence of the completion of gas installation project in Malaysia; (ii) whether the court could be burdened to hold an inquiry of facts to determine the completion of gas installation when relevant statutory provisions provide for a mechanism of the completion through the Energy Commission; (iii) whether the court could refer to relevant statutory provisions to determine time of completion where a private contract was silent; and (iv) whether the burden of proving that the back to back payments were yet to be received from the main contractor was on the respondent.

Held (dismissing appeal with costs):

(1) Regulations 16, 17 and 18 of the GSR provided for the manner on how to determine completion of gas installation works. The respondent could only apply for a Certificate of Completion and the ATO upon the completion of the new gas installation work. The appellant had misconstrued the completion date as the determinant factor in the completion of the works. Liquidated and ascertained damages ('LAD') could have been claimed against the respondent for any delay. The trial judge was correct in referring to these regulations as it dealt specifically with gas installation. The appellant's argument that the trial judge erred in referring to these regulations were baseless and was rejected. (paras 11, 12 & 13)

(2) Gas Malaysia Sdn Bhd was not a statutory body and an inspection by them was not a requirement to determine whether the works were completed. The decision by the trial judge to allow the respondent's claim on the grounds that the works had been completed was correctly made and it was a finding of fact. There was no error of law and fact committed by the trial judge as the evidence had been properly evaluated. (paras 15 & 18)

(3) The fact as to whether the payments were made was within the knowledge of the appellant as the documents were in the possession of the appellant. Applying s. 106 of the Evidence Act 1950, the burden of proving that RM116,950 was yet to be received from the main contractor was upon the appellant. The appellant could not be allowed to use the back-to-back

A basis clause as a shield or excuse to refuse to make payments to the respondent for works that were completed. When the literal interpretation of back-to-back basis would result in grave injustice, the clause would carry no merit and would fail. (para 16)

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Case(s) referred to:

Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd [2010] 2 CLJ 28 CA ***(refd)***

Noorianti Zainol Abidin & Ors v. Tang Lei Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC ***(refd)***

C *Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC* ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 106

Gas Supply Regulations 1997, regs. 16, 17, 18

D *For the appellant - Yip Fook Thai; M/s Yip & Co*

For the respondent - Nedu Maran; M/s Nedu Maran & Co

Reported by Sandra Gabriel

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JUDGMENT

Hadhariah Syed Ismail JC:

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Introduction

[1] This appeal raises the issue of a true construction of a contract. Parties had entered into a construction contract. The respondent as sub-contractor sued the appellant for payment of RM116,950 being the balance due and owing for works done and G completed. Appellant refused to make payment contending the respondent had not completed the works. The sole issue before the Sessions Court is whether the respondent had completed the works contracted by them and the manner of determination of the same. The learned Sessions Judge found in favour of the H respondent and in doing so, she had referred to statute and regulations. She also dismissed the appellant's counterclaim. Dissatisfied, the appellant appealed to this court. On 13 November 2010, I dismiss the appellant's appeal with costs. Against my decision, the appellant appealed to the Court of Appeal.

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Facts

[2] The contract entered into between the parties is for the respondent to design, construct and complete gas installation works of 632 units of government apartment at Precinct 17 in Putrajaya. The contract, marked as P1 can be found on p. 338 of the Appeal Record. P1 states that the lump sum sub-contract shall be RM750,000. The following conditions *inter alia* appears on P1:

(a) The overall completion date of the main contract is on 23 December 2005.

(b) The liquidated and ascertained damages (LAD) is RM25,000 per day.

(c) The defect liability period shall be 24 months or until issuance of the certificate of making good defects whichever is the later commencing from the date of issuance of the certificate of practical completion.

(d) Mode of payments: respondent to submit monthly progress claim to the appellant, latest by 25th of each calendar month. Payments made shall be in the form of back to back basis ie, upon received payment from the client/employer.

(e) Respondent to take early action to liaise with all the authorities having jurisdiction over works undertaken to ensure that the works will be accepted for the issuance of the certificate of fitness.

[3] The respondent's pleaded case is they have completed the works. They relied on the following documents as proof of completion:

(i) Perakuan Siap issued on 12 July 2007 under Peraturan 17, Peraturan-Peraturan Bekalan Gas 1997 and Akta Bekalan Gas 1993.

(ii) Kelulusan Mengendali (Approval To Operate) issued by Suruhanjaya Tenaga on 29 August 2007 pursuant to per. 16, Peraturan-Peraturan Bekalan Gas 1997.

(iii) 25 progress claims have been issued by the respondent and received by the appellant.

[4] But as at the date of filing of this action in 2008, the appellant have paid them only RM586,000, thus leaving the balance sum of RM116,950 due and owing by the appellant.

[5] The claim was resisted by the appellant. Their pleaded defence are:

(i) The respondent had failed to complete the sub-contract works by 23 December 2005 as agreed.

(ii) The respondent had breached the contract by abandoning the sub-contract works.

(iii) The appellant had to engage a third party to complete the sub-contract works and caused the appellant to suffer loss and damage.

Appellant's Counterclaim

[6] The appellant counterclaim against the respondent for:

(i) Special damages of RM197,500.

(ii) General damages for breach of contract.

(iii) Interest and costs.

Findings Of Trial Court

[7] The learned trial judge was of the opinion that:

(a) P1, the sub-contract did not provide the manner in which sub-contract works were said to have been completed.

(b) Therefore, court may look at regs. 16, 17 and 18 of the Gas Supply Regulations 1997 to determine whether sub-contract works were completed and that sub-contract works were indeed completed.

(c) She also found that an inspection by Gas Malaysia Sdn Bhd was not a requirement to be considered to determine whether sub-contract works were completed or otherwise.

The Issues

[8] There are four issues raised in this appeal, namely:

(i) Whether an issuance of an approval to operate (ATO) by Suruhanjaya Tenaga is a conclusive evidence of the completion of a gas installation project in Malaysia in view of the relevant statutory provision and in the absence of any complaint to Suruhanjaya Tenaga to the contrary?

(ii) Whether the signing by the appellant's project coordinator of P9, P10 and P11 (which are statutory documents) is a conclusive evidence of completion of the gas installation project in the absence of any letter from the appellant to Suruhanjaya Tenaga stating that P9, P10 and P11 were incorrect?

(iii) Whether the court could be burdened to hold an inquiry of facts to determine completion of the gas installation project when the relevant statutory provisions provide for a mechanism to determine the completion through Suruhanjaya Tenaga and the parties had adopted such mechanism and subsequently neither party had complained to Suruhanjaya Tenaga of the issuance of the approval to operate (P12)?

(iv) Whether by virtue of P1, respondent is required to just complete the gas installation project only or to continue to attend to the project even after completion?

Evaluation Of Evidence

[9] The crux of the appellant's complaint relates to the approach taken by the trial judge in referring to Gas Supply Regulations 1997 and Gas Supply Act 1993 in determining whether the works were completed. The appellant argued that the correct approach is for the trial judge to refer to the terms contained in the contract (P1) itself. It is further argued that there is no rule of law which states that the court in interpreting a private contract should look into what a particular statute provides to determine what was the scope of the contractual obligations between the parties in so far whether the works were completed. The guiding principles applicable in evaluating evidence presented before the court are discussed in many cases. The basic of all is a trial judge should not approach a case upon the basis of deciding which of the two conflicting stories should be believed, but rather on the basis of considering which version is inherently probable or improbable; see

A *Noorianti Zainol Abidin & Ors v. Tang Lei Nge* [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545; the judicial reception of evidence requires that oral evidence be critically tested against the whole of other evidence and the circumstances of the case; see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979]
B 2 MLJ 229.

[10] In his written submission (at the time of hearing this appeal, I had no opportunity of hearing appellant's counsel oral submission as the written submission was not filed yet and counsel
C was not present) the appellant sought to show that the trial judge had disregarded the appellant's contemporaneous documents as well as failed to evaluate the evidence in accordance with the accepted principles of law. In particular, the appellant alleged the trial judge had failed to appreciate that:

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(i) The sub-contract (P1) provide that completion was to be by 23 December 2005 and there was no evidence led to that effect.

(ii) Contemporaneous documents produced do not support works
E were completed. These documents show only 80%, 90% and 87% of the works only.

(iii) The contract sum is RM750,000. If the works were completed, the balance outstanding sum due to the
F respondent would be RM164,000 (RM750,000 less RM586,000 paid). But, the amount claimed by the respondent is RM116,950. This by itself clearly shows the works were not completed.

G (iv) In placing great reliance on P9, P10 and P11 when these exhibits are self serving documents.

(v) The appellant's exhibit at p. 494 of the appeal record titled "Kelulusan Untuk Memasang" which was issued sometime on 11 November 2008 was not considered at all. This latter
H certificate was issued to the appellant's subsequent sub-contractor appointed to complete the sub-contract works.

(vi) Even assuming P9, P10 and P11 did show sub-contract works were completed, as part of the completion, the respondent
I also had to deliver the as built drawing, warranties, operation and maintenance manuals and these have not been done.

[11] Having read the sub-contract (P1), I had to disagree with the appellant's contention. The completion date of 23 December 2005 refers to the overall completion of the main contract. The respondent's work is only a partial of the overall main contract. That means the respondent must complete their works on or before 23 December 2005. In a nutshell this completion date only state the time limited to complete the works and not the manner of completion of the same. The appellant has misconstrued the completion date as the determinant factor in determining completion of the works. If there is delay in completion of the works, LAD would have been claimed against the respondent. There was no evidence to that effect here. It is not correct to say the trial judge did not refer to the terms of the contract in determining whether the works were completed. Instead she did refer to the sub-contract (P1) and her findings is stated in para. 2 of her grounds of judgment (at p. 53 appeal record). This is what she said:

> In order to determine whether the project has been completed or not (as this case is about gas installation), this court have to look at the terms of the Letter of Award (P1), whether it is provided so. However, having perused P1, the manner of which completion of the project was not provided for. Therefore, having read the submissions of both learned counsel, this court is in agreement with the submission of the plaintiff's counsel, that in the absence of any provision for the manner of which completion of this project is determined, regulations 16, 17 & 18 of the Gas Supply Regulations 1997 must be referred to, which stipulate that the completion of any gas installation project is in 3 stages as follows ...

[12] Having read P1 myself, I found the trial judge's conclusion that P1 did not contain provisions with regard to the manner of determination of completion of the works is correct. To appreciate whether the approach adopted by the trial judge in referring to the provisions of other statute is correct or not, it is pertinent to note the nature of works undertaken by the respondent. Evidence led by the respondent's first witness (PW1), who is the sub-contractor for the works are as follows:

> Q: Apakah kerja-kerja yang dibuat oleh Encik Yap dalam projek tersebut?
>
> A: Memasang paip gas daripada under ground MDPE paip sehinggalah ke unit apartmen.

Now, Gas Supply Act 1993 and Gas Supply Regulations 1997 define "work" in relation to a gas pipeline or gas installation, means the following work:

(a) installing a gas pipeline or gas installation;

(b) constructing testing, fixing, operating, maintaining, servicing, adjusting, repairing, altering or renewing a gas pipeline or gas installation or the purging of air or gas in the gas pipeline;

(c) changing the position of a gas pipeline or gas installation; or

(d) removing a gas pipeline or gas installation.

[13] The respondent's works falls under category (a). Further reading to the scope of application of the regulation under reg. 3, it reinforced the fact that this regulation applies in the present case. Regulations 16, 17 and 18 referred to by the trial judge dealt with approval to operate, certificate of completion and test certificate respectively. I wish to emphasise here that both regs. 16 and 17 mentioned that only on completion of a new gas installation work, the applicant shall apply for certificate of completion. The respondent's witnesses who are registered with Suruhanjaya Tenaga had testified that they had applied for approval to operate and they had obtained the approval. Looking at the provisions of this regulation, there is no doubt that these regulations provide for the manner on how to determine completion of gas installation works. As Gas Supply Regulations 1997 deal specifically with gas installation, automatically these regulations apply in this case. Therefore, the trial judge is perfectly right in referring to these regulations. In the circumstances, the appellant's argument that the trial judge erred in referring to these regulations is baseless and must be rejected.

[14] The next issue raised by the appellant is that the trial judge had erred in accepting P9, P10 and P11 as proof of completion. Let's look what these exhibits say. In paras 4, 5, 6 and 7 of her grounds of judgment, the learned trial judge explained each of the exhibit and this is her conclusion:

> 4. By looking at P9, under item 8, it was stated "Memuaskan" for Ujian kebocoran. There is also a paragraph before the signing column which states as follows:
>
> > Saya dengan ini mengesahkan bahawa pepasangan di atas telah diuji pada 19 - 20.6.2007 mengikut Akta Bekalan Gas 1993 dan Peraturan-Peraturan Bekalan Gas 1997.

5. And from P10, there is a paragraph which states that "Saya dengan ini memperakui bahawa pepasangan di atas telah dipasang dan disiapkan pada 18.6.2007 mengikut Akta Bekalan Gas 1993 dan Peraturan-Peraturan Bekalan Gas 1997.

6. Lastly, as for the third stage, an application for approval to operate the gas installation was made ie, P11. This document was also signed jointly by SP3 and Tan Ting Leong (Tan Ting Leong is the appellant's representative-this is my own addition just to highlight the point that both parties sign P11).

[15] Based on P9, P10 and P11, the trial judge was correct when she concluded that the works were completed. To say otherwise would go against the weight of the evidence and runs counter to the very words used in the documents and that the works were completed. Not only that, she also considered that Gas Malaysia Sdn Bhd is not a statutory body but a private limited company and there is no requirement for the respondent to obtain Gas Malaysia Sdn Bhd's approval to obtain Approval To Operate (ATO). Having read the grounds of judgment of the learned trial judge, I had only this to say. She had identified the issue which is whether the respondent had, completed the gas installation works. She had acknowledged that there were two materially conflicting versions. She had evaluated the oral testimony as well as the contemporaneous documents. She applied the correct law and adopted the correct approach in resolving the dispute. After analysing all the evidence, she had accepted the respondent's version (to that of the appellant) as it was supported by contemporaneous documents. Her finding is a finding of fact. It is trite law that court exercising appellate jurisdiction should be slow to interfere with a finding of fact made by a trial court who had the benefit of seeing and hearing witnesses gave evidence. It is up to the trial judge if she chose to accept the respondent's version. Contrary to the appellant's submission, I find the trial judge had not misdirected herself either on law or facts that warrant intervention by this court. Instead if the appellant's submission on the interpretation of P1 is to be solely confined to P1, it will result in absurdity and grave injustice to the respondent. To conclude, I would say that the decision made by the trial judge to allow the respondent's claim on the ground the works had been completed is correctly made and supported by evidence.

A **Back To Back Basis**

[16] Earlier on I have quoted one of the agreed terms in the sub-contract is payment to be on the back to back basis. This term means for the respondent to be paid, the appellant must
B have first receive the same from the main contractor and/or employer. The appellant submitted that the burden to prove that the appellant had received the sum claimed herein lies on the respondent, citing the case of *Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd* [2010] 2 CLJ 28. The appellant further
C submitted that the respondent has not discharged this onus of proof and thus, the respondent's claim ought be dismissed. On the other hand, the respondent submitted the appellant bears the burden of proving that it is dependant on payments from its main contractor. It is further submitted that the appellant must prove
D that the sum of RM586,000 already paid to the respondent was paid upon receipt of the same from the main contractor. Thus, for the remaining sum of RM116,950 claimed herein, the appellant must prove this sum has yet to be paid by its main contractor. The appellant's witness, SD4 was asked in cross-examination as
E to whether the respondent was informed of the payment from the main contractor and his reply was "not necessary to inform plaintiff". This being the case, how can the burden of proof lies on the respondent? The fact whether payment is made or not by the main contractor is within the knowledge of the appellant only.
F The documents are in the possession of the appellant. I entirely agree with the respondent's submission that s. 106 of the Evidence Act 1950 which states: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him" applies in this case. Applying s. 106 to the fact
G of this case, I hold that the burden of proving that RM116,950 is yet to be received from the main contractor is upon the appellant. It is true that the learned trial judge did not address herself with the issue of back to back basis in her grounds of judgment. I was of the view that although the mode of payment is back to back,
H the respondent is entitled to demand for payments for works they had completed. Otherwise, the respondent will be kept waiting indefinitely. As long as the respondent had submitted their progress claim on or before the 25th day of the month, it is the duty of the appellant to demand for payment from the main
I contractor or employer. I was of the opinion that the burden lies on the appellant to prove to the court what steps they have taken to collect this payment. The respondent's works were completed

in the year 2007. The summons and statement of claim was filed in 2008 and decision was delivered in 2010. From 2007 to 2010, the respondent had waited for three years to get their payment. To suggest that the respondent had to wait further for the payment is unreasonable. I am sure if the appellant is in the respondent's shoe, they wouldn't want to wait any longer than what is reasonable. The appellant cannot be allowed to use back to back basis clause as a shield or excuse to deny making payment to the respondent. On the facts and circumstances of this case, when literal interpretation to back to back basis would result in grave injustice to one party, the court must lean in favour of the claimant. I, therefore conclude that there is no merit in the issue of back to back basis and it must fail.

Appellant's Counterclaim

[17] The appellant had claimed for special damages in the sum of RM197,500. This sum is allegedly arose as a result of them appointing a third party sub-contractor, BGS Engineering Sdn Bhd to complete the works that were not completed by the respondent. To prove the claim, the appellant relied on a quotation from BGS Engineering Sdn Bhd dated 5 July 2008 for the sum of RM196,592 as stated on p. 464 of appeal record and letter of award dated 15 September 2008 to BGS Engineering Sdn Bhd as stated on p. 465 of appeal record. The learned trial judge had rejected this claim on the ground there was no evidence from BGS Engineering Sdn Bhd to support the appellant's counterclaim as to the exact nature of their works. She was of the opinion that evidence from BGS Engineering is crucial as evidence was led by the appellant's witness (SD4) that the alleged works were not completed by BGS Engineering Sdn Bhd in 2009 and even in 2010. Obvious from the reasoning advanced by the trial judge that she is not convinced at all that BGS Engineering Sdn Bhd had completed works to the value of RM197,500. To her, the appellant had failed to discharge the onus of proof. This is a finding of fact. I am not persuaded to disturb this finding of fact. Therefore, this ground of appeal also must fail.

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Decision

[18] After careful analysis of the contents of the appeal record as well as the parties written submissions, I simply cannot find any error of law or fact committed by the learned trial judge. She has
B properly evaluated the evidence and had come to a correct decision, I further find there is no merit in this appeal. On those grounds, I dismiss this appeal with costs.

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